REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

Criminal Appeal 20 of 2009

JOHN OMONDI ODIANGA alias ODIANGA OJOO…… APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

[From original conviction and sentence in Criminal Case number 927 of 2007 of the Senior Resident Magistrate's Court at Bondo]

JUDGMENT

The appellant, **John Omondi Odianga** Alias **Jack Omondi Odianga Ojoo,** appeared before the Senior Resident Magistrate at Bondo charged with defilement of a girl of the age of thirteen years contrary to Section 8 (1) (3) of the Sexual Offences Act, in that on the 30th August 2007 in Siaya District, intentionally and unlawfully caused penetration with a child **E.A.N**, a girl of the age of thirteen (13) years.

There was a second count of indecent assault with a child contrary to Section 11 (1) of the Sexual Offences Act in that the appellant on the same 30th August 2007 unlawfully and indecently assaulted E.A. N by touching her private parts.

There was a further third count of creating disturbance in a manner likely to cause a breach of the peace contrary to Section 95 (1) (b) of the Penal Code in that on the same day and place the appellant created disturbance in a manner likely to cause a breach of the peace by chasing **James Akatch Oyieyo** while armed with a panga and a rungu in order to injure him.

After pleading not guilty to all the counts, the appellant was tried, convicted and sentenced to ten (10) years imprisonment for attempted defilement under Section 9 (1) of the Sexual Offences Act. The learned trial magistrate found that the prosecution had proved the lesser offence of attempted defilement rather than actual defilement under Section 8 (1) of the Sexual Offences Act.

The appellant was however found not guilty on counts two and three and acquitted accordingly.

The learned trial magistrate rightly observed that the second count should not have been drafted as a separate count but an alternative count to the main count of defilement.

Be that as it may, the appellant was dissatisfied with the conviction and sentence and preferred this appeal on the basis of the grounds of appeal contained in the petition filed herein on 2nd February 2009 and supplementary grounds filed on 3rd May 2010.

At the hearing of the appeal, the appellant fully relied on his supplementary grounds of appeal after allowing the respondent to address the court first.

Miss Oundo, the learned Senior State Counsel, opposed the appeal on behalf of the respondent. She submitted that the appellant was rightly convicted for the offence of attempted defilement as he was caught "**red handed**" and that his conduct of fleeing and arming himself to attack a reportee was not that of an innocent person.

The learned State Counsel further submitted that the evidence of PW2 and PW3 corroborated that of the victim and that PW4 confirmed that there was a sexual offence even though penetration was lacking.

On the alleged violation of the appellant's constitutional rights, the learned State Counsel submitted that the appellant was availed in court at the earliest opportunity having been arrested on a Thursday and there being two days forming a weekend when the courts do not normally function.

On the production of the P3 form, the learned State Counsel submitted that any medical practitioner may produce the same under Section 77 of the Evidence Act.

This court's obligation is to reconsider the evidence adduced at the trial court and make its won conclusions bearing in mind that the trial

court had the advantage of seeing and hearing the witnesses.

In summary, the prosecution case was that, **E.A.N** (PW1) was at the material time aged thirteen years and a standard six primary school pupil. She was in the kitchen cooking when the appellant went there, grabbed and gagged her. He then pinned her down and threatened to kill her if she made noise. He removed his pants as well as hers. He then raised her skirt and did "bad things" with her. She pushed him away but was already hurt and felt some "hot fluid" in her genitals.

M.O.O (PW2 but shown in the record as PW1) an uncle to E heard screams at about 12:00 p.m. and rushed towards his home where he found E crying and saying that the appellant had defiled her. The appellant was arrested after the matter had been reported to the police. M (PW2) is also an uncle to the appellant. **D.O** (PW3 but shown in the record as PW2) also heard the child E screaming and rushed to the scene only to find the appellant defiling her. He had pinned down the child and had pulled down her pants as well as his trousers. He ran away after his name was called out.

D (PW3) briefed M (PW2) on what he had seen and when the two were heading to the Akala Police Station, the appellant confronted them while armed with a club. He attempted to block them from taking E to Hospital but all in vain.

P. C. Chrispines Lumwachi (PW4 but shown in the record as PW3) of Ugunja Police Patrol Base was on duty on the material date at 3:00 p.m. when it was reported that E had been defiled by the appellant. He (PW4) issued a P3 form which was duly filed. He was informed that the appellant armed with a panga (machete) and a club had threatened D (PW3) and another while they were escorting E to report the matter. A medical officer at Bondo District Hospital **Dr. Shadrack Kirui** (PW5 but shown in the records PW4) produced the P3 form which was filled at Akala Health Centre.

The appellant was placed on his defence on the basis of the foregoing evidence from the prosecution. In his unsworn statement he stated that on the date of his arrest he found a cow belonging to one J.A. O eating vegetables in his (appellant's) farm. He confronted the said James who did not say anything but instead insulted him (appellant) and his mother. He (appellant) said nothing but left the scene and proceeded to the market to buy nails as he was building a house for his mother. As he was returning, he met James and one of his sons (i.e. M). The two had a panga and club respectively. He was hit on the head with the club. He held M and the two fell down. He blocked an attempt made by James to cut him with the panga. He sensed more danger and ran to his house from where he was arrested by the police led by James. He was later taken to court and pleaded guilty to an offence and was jailed for one year. After four months and while in prison, he was taken back to the court and the present charges were read to him. He knew nothing about the charges.

After considering both the prosecution and defence case, the learned trial magistrate concluded that the medical evidence availed was consistent with the offence of attempted defilement and not that of defilement. Consequently, the appellant was convicted and sentenced for the lesser offence of attempted defilement.

Under **Section 180 of the Criminal Procedure Code**, a person charged with an offence may be convicted of having attempted to commit that offence although he was not charged with the attempt. It was not therefore unusual for the appellant to be convicted for an offence which he was not charged with.

The question that emerges herein is whether the conviction was sound and proper. On the evidence, this court would hold that indeed the conviction was sound and proper. There were cogent facts to warrant the conviction of the appellant for the offence of attempted robbery. Although the medical evidence did not establish the fact of penetration as presupposed by Section 8 (1) of the Sexual offences Act, the only other possible offence that was disclosed was that of attempted defilement.

The medical evidence showed that semen was released on the complainant's external genitalia. This was clear evidence of a sexual assault against the complainant in the form of an attempted defilement.

The complainant was categorical that the appellant was the person responsible for the offence. He was not a stranger to her. They are relatives. The medical examination report (P3 form) was produced by a doctor other than the one who completed and signed it. This was permissible under **Section 77 of the Evidence Act** and did not in any manner prejudice the appellant. In any event, the record of the lower court does not show that he raised any objection to the production of the P3 form by Dr. Kirui (PW5).

The defence raised by the appellant was given adequate consideration by the learned trial magistrate who found it rather wanting in the light of the strong and credible evidence against the appellant. This court agrees with the learned trial magistrate in that regard and adds that the defence was incapable of discrediting and rebutting the prosecution evidence with regard to the appellant's culpability in the offence.

The inconsistencies in the prosecution case which were pointed out by the appellant were not significant to alter the fact that the offence was committed and that the appellant was responsible.

As to the alleged violation of the appellant's constitutional rights under Section 72 (3) of the Constitution, the explanation given by the learned State Counsel was reasonable and sufficient. It demonstrated that the appellant was produced in court as soon as it was practicable and if at all there was any delay it was not inordinate.

In his supplementary grounds of appeal and particularly ground one, the appellant raised an interesting point. He complained that he was not given the opportunity to challenge the evidence of the complainant (E) before she was stood down and that she was not re-called to testify after the charge sheet was altered.

The complaint is in the opinion of this court unfounded. The complainant gave an unsworn statement after the usual "**voire – dire**" examination if at all it was necessary. The opportunity for the appellant to challenge the complainant's evidence by way of cross-examination was therefore unavailable. Further, having previously testified, it was unnecessary to have the complainant re-called after the charge was altered. In any event, the alteration did not prejudice the appellant as it was only intended to substitute the offence of attempted defilement under Section 9 (1) Sexual Offences Act for that of defilement under Section 8 (1) (3) of the Sexual Offences Act.

Ironically, the appellant ended up being convicted of attempted defilement which was done away with by the amendment to the charge sheet. The prosecution "jumped the gun' and introduced a more serious offence only after the evidence of the complainant was heard. That was a mistake but not a fatal one, courtesy of Section 180 of the Criminal Procedure Code.

All in all, the appeal lacks merit and is dismissed to the extent that the conviction and sentence imposed upon the appellant by the learned trial magistrate are hereby sustained.

Dated, signed and delivered at Kisumu this 5h day of May 2010

J. R. KARANJA

JUDGE